SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 141

THE CONFEDERATED BANDS OF UTE INDIANS,
Petitioners,

vs.

THE UNITED STATES

REPLY TO BRIEF IN OPPOSITION

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
FRANCIS M. GOODWIN,
Counsel for Petitioners.

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1: Respondent attempts to dismiss in one curt paragraph (Brf. in Opp., page 16) the holdings of this Court that treaties and agreements with Indian tribes are to be construed as the *Indians understood them* (Petn., pages 11-12). Respondent purports to misunderstand the doctrine and attempts to fuse it with the rule that "doubts must be resolved in favor of the Indians." Actually these two rules of interpretation are very different. Liberal construction, to which respondent refers, is a rule which applies to treaties generally—not merely treaties with Indian tribes. *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487; *Factor* v. *Laubenheimer*, 290 U. S. 276, 293-4; *Asakuru* v. *City of Seattle*, 265 U. S. 332, 342. But petitioner does not point to mere liberal construction as establishing the conflict of the opinion below with the opinions of this Court cited in the petition.

There is the flat conflict, completely overlooked in the brief in opposition, between the opinion below and the opinions of this Court with respect to the other rule that the understanding of the Indians must prevail. (Petn., pages 10-12.)

There is excellent reason for this rule, since in negotiations between the United States and an Indian tribe at the time these treaties or agreements were negotiated, the United States had it completely within its power to make its own intention clear. The Indians, who signed by mark (Treaty of March 2, 1868, 15 Stat. 619, 2 Kappler 990; agreement ratified by Act of June 15, 1880, 21 Stat. 199, 1 Kappler 180) were not masters of the language in which the treaty was written, and could not conceivably have understood respondent's technical exposition of the meaning of "title" in Section 3 of the Act of 1880, even if they had understood the language. In this respect the case is exactly like that of *Jones* v. *Meehan*, 175 U. S. 1, 10-12, wherein it was said:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according

to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester* v. *Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737, 760; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 28. In the case of *Worcester* v. *Georgia*, (1832) Chief Justice Marshall, speaking of article 4 of treaty of Hopewell of November 28, 1785, between the United States and the Cherokee Indians, which defined 'the boundary allotted to the Cherokees for their hunting grounds, between the said Indians and the citizens of the United States,' (7 Stat. 19,) said: 'There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language, from the fact that every one makes his mark; no chief was capable of signing his name. It is probable the treaty was interpreted to them.' "Is it reasonable to suppose that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out?" 6 Pet. 551, 552. And Mr. Justice McLean, concurring, said 'The language used in treaties with the Indians should never be construed to their prejudice. 'To contend that the word "allotted," in reference to the lands guaranteed to the Indians in certain treaties indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do justice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.' 6 Pet. 582."

The decision of the court below departs completely from the above decision of this Court.

2. Respondent argues that the Act of 1880 was concerned with the apprehension of parties guilty of the so-called Meeker Massacre, rather than the cession of land in Colorado. As can be shown on the merits of this case,

the Meeker Massacre was occasioned by incitements in no way chargeable to the Indians, and under circumstances which made the acts complained of substantially justifiable warfare. That "massacre" merely provided an excuse for the removal of the Utes from Colorado—a consummation which the white people then infringing upon the Ute reservation devoutly wished. Contrary to respondent's statement that "the United States was not committed in the agreement itself to compensate the Indians for said lands sold" the only agreement which was ever reached was the agreement in Section 3 of the Act of June 15, 1880, to sell the ceded lands under the public land laws and hold the proceeds in trust for the petitioners. The preliminary "agreement," to which respondent apparently refers, and which was set out as a preamble to the act of 1880, was merely an undertaking by the chiefs then in Washington to "use their best endeavors" with their people to procure their consent to cede to the United States all of the territory of the present Ute reservation in Colorado. The agreement proposed by Congress and incorporated in Section 3 of the Act of 1880 was, after passage by Congress, ratified by the Confederated Bands of Ute Indians, petitioners; and it is the only agreement which the tribe *qua* tribe entered into. Finding 12, R. 20-22.

Petitioners believed that the reservation under the Treaty of 1868 encompassed lands considerably to the north of those included in the Executive-order addition to their reservation. Finding 6, R. 13-14. There is, therefore, considerable reason for saying that the Treaty of 1868 itself conveyed these lands to petitioners, their understanding of the unmarked imaginary line described in that treaty being that it was considerably to the north of even the north line of the Executive-order addition. Irrespective of this, however, when the understanding of the Indians

is established that their "present reservation" in 1880, which they thought they were ceding in trust, included the present lands, as the court below found, that understanding must prevail.

It is ratified by Act of Congress and the formal assent of petitioners. It is not a claim based upon a mere transitory Executive-order addition to an Indian reservation for temporary convenience such as that which confronted this Court in *Sioux Tribe* v. *United States*, 316 U. S. 317.

Conclusion

The petition should be granted.

Respectfully submitted,

ERNEST L. WILKINSON,
JOHN W. CRAGUN,
FRANCIS M. GOODWIN,
Counsel for Petitioners.